DAN MORALES
ATTORNEY GENERAL

January 23, 1996

Mr. Robert J. Provan
General Counsel
The Texas State University System
P.O. Box 3810
Austin, Texas 78701-3942

OR96-0070

Dear Mr. Provan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code.[1] Your request was assigned ID# 22684.

Sam Houston State University (the "university") has received a request from an employee who was denied a promotion within the university. The requestor seeks, among other things,

> [a]ny and all documents regarding me and my suitability for employment by or promotion within the Sam Houston State University Department of Public Safety/Services that may be maintained by the Sam Houston State University Counseling Center, including, but not limited to, the results of any psychological testing or evaluation.

You state that, as part of the promotional process, the requestor "voluntarily submitted to some psychological tests at the university's Counseling Center." You contend that sections 552.101, 552.102,[2] and 552.110 of the Government Code authorize the university

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[1]We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (to be codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142. A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.* The request at issue was received by the university prior to September 1, 1995.

[2]Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 599-600, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 6, 1995 Tex. Sess. Law Serv. 5127, 5130-31.

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to withhold the test results from the requestor.[3] We do not understand you to contest the availability of any of the remaining requested information. We assume, therefore, that you have released it to the requestor.[4]

Section 552.303[5] of the Government Code requires a governmental body, when it requests the decision of the attorney general as to the availability of particular information under chapter 552, to supply the attorney general with the specific information requested. You have failed to do so. We understand that the university's counseling center refused to release the requested test results to this office for our review either because of its licensing agreement with National Computer Systems ("NCS"), which produces the psychological test the requestor took, or because of an overabundance of caution. In general, state agencies may transfer confidential information between themselves without destroying the confidential character of the information. *See* Open Records Decision No. 567 (1990) at 2 and sources cited therein; *see also* Open Records Decision No. 516 (1989) at 5 (*stating that interagency transfers of information are not considered "public" disclosure*). Moreover, the failure to supply the requested information to the attorney general as mandated by the requirements of chapter 552, results in a presumption that the requested information is public. *See* Open Records Decision No. 195 (1978) at 2.

The governmental body may overcome this presumption by showing that the information is confidential by law or that an exception designed to protect the interest of a third party is applicable. *Cf.* Open Records Decision No. 552 (1990) at 1. Two of the exceptions you raise, sections 552.101 and 552.102, pertain to confidential information. The third exception you raise, section 552.110, protects the interests of third parties.

As a threshold issue, we note that the requestor is the subject of the information. Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.-- Austin 1983, writ ref'd n.r.e.) (ruling that test to be applied in decision under statutory predecessor to Gov't Code § 552.102 was same as that delineated in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for statutory predecessor to § 552.101). Privacy interests arise only in the context of a particular individual vis-`a-vis others, and are not implicated where only the person

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[3]In various sections of your letter to this office, you appear to suggest that the requestor seeks access to the actual test he took, as well as the results of his test. The requestor has verified over the telephone that he seeks access to the test results only. Thus, we do not consider here the availability of the test itself.

[4]If a governmental body refuses to supply public information to a person who has requested access to it, the requestor may file an action for a writ of mandamus compelling the governmental body to make the information available for public inspection. *Id.* at 606 (amended 1995) (former Gov't Code § 552.321). A plaintiff or defendant who substantially prevails in such an action may recover costs of litigation and reasonable attorney fees. Gov't Code § 552.323(a).

[5]Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 605, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 19, 1995 Tex. Sess. Law Serv. 5127, 5139. *But see* Gov't Code §§ 552.301(b), .303 (statutory requirements for requests made on or after September 1, 1995).

himself is concerned. Open Records Decision No. 481 (1987). Accordingly, you may not withhold information about the requestor on the grounds that its release would be an invasion of privacy; the documents are not excepted under section 552.102.

Section 552.101 of the Government Code requires a governmental body to withhold from required public disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision."[6] You believe that section 611.0045 of the Health and Safety Code authorizes the university to withhold the information from the requestor.

Section 611.0045 provides in pertinent part as follows:

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. *The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.*

(d) The professional who denies access to a portion of a record under this section shall *redetermine the necessity of the denial at each time a request for the denied portions is made.* If the professional again denies access, the professional shall notify the patient of the denial and document the denial as prescribed by Subsection (c).

. . . .

(i) The professional or other entity that has possession or control of the record shall grant access to any portion of the record to which access is not specifically denied under this section within a

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[6]In connection with your argument that Government Code section 552.101 excepts the requested information from required public disclosure, you cite a letter from the university's director of counseling services, apparently to the requestor, dated October 1, 1993, that "[t]he agreement with the test company is that the tests are not to be given to clients or any member of their family." A governmental body may not agree to keep information confidential unless the governmental body is specifically authorized by statute to do so. *See* Open Records Decision No. 514 (1988) at 1. Information is made confidential *only* by statute, under the constitution, or under the common law.

reasonable time and may charge a reasonable fee. [Emphasis added.][7]

In chapter 611, the term "patient" denotes "a person who consults or is interviewed by a professional for diagnosis[or] evaluation . . . of any mental or emotional condition or disorder . . . ." Health & Safety Code § 611.001(1). The term "professional" includes "a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder." *Id.* § 611.001(2)(B).

We understand that Dr. Copeland, who is the custodian of the requested information, is a licensed psychologist in the State of Texas. Thus, she is a professional for purposes of chapter 611. Additionally, we agree with your assertion that the requestor is a patient within the context of chapter 611. Finally, you have provided us with a copy of a letter from Dr. Copeland to the requestor, dated July 18, 1994, stating that the release of the requested information "would be harmful to [his] physical, mental or emotional health." In her letter, however, Dr. Copeland does not state the duration of the denial.

The written statement does not comply with the explicit requirements of section 611.0045(c). Subsection (i) requires a professional or entity that has possession or control of the record to release the record unless section 611.0045 *specifically* denies access. Section 611.0045 does not specifically deny access to information if the professional has provided a written statement refusing access that fails to comply with section 611.0045(c). *See also* Open Records Decision No. 478 (1987) at 2 (stating that, in general, statutory predecessor to Gov't Code § 552.101 requires express language making particular information confidential). We therefore conclude that section 611.0045 requires the university to release the requested information to the requestor unless the university gives the requestor a "signed and dated written statement that having access to the record would be harmful to the [requestor's] physical, mental or emotional health . . . [and that specifies] the portion of the record[s] to which access is denied, the reason for denial, and the duration of the denial."[8] We remind the university that there are legal remedies

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[7]We note that section 611.008 of the Health and Safety Code provides a specific time period for complying with a written request from a patient to examine or copy all or part of the patient's recorded mental health care information.

[8]We note that a patient may select a professional, other than the professional denying access to the requested mental health record, to treat the patient for the same or a related condition. The professional who is denying access to the mental health record must, upon request, allow the patient's selected professional to examine and copy the confidential record. *See* Health & Safety Code § 611.0045(e). You have submitted to this office a copy of a letter dated August 9, 1994, from Dr. Copeland to the requestor in which Dr. Copeland agrees to release, upon the requestor's completion of a release of information form, the requested information to another professional psychologist of the requestor's choosing.
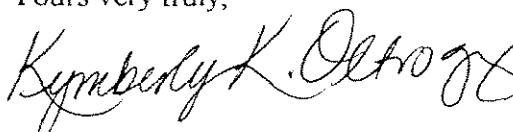
We further note that the professional who is the custodian of the mental health record *must* make available the content of the record to a person, acting on the patient's behalf, who has the patient's written consent. *Id.* § 611.0045(f); *see also id.* § 611.004(a)(4). Although section 611.004(d) generally prohibits a person who receives confidential information from mental health records from disclosing the information for any purpose inconsistent with the authorized purpose for which the person originally obtained the information, a person who obtains the information with the patient's written consent is not subject to this prohibition. *Id.* § 611.004(d).

available to the requestor for the failure to disclose confidential communications or records in violation of chapter 611 including injunctive relief or a civil cause of action for damages. Health & Safety Code § 611.005(a), (c). The burden of proving that a denial under section 611.0045 is proper is on the professional who denied the access. *Id.* § 611.005(b).

Information that a statute other than chapter 552 expressly makes public is not subject to the exceptions to required public disclosure. Open Records Decision No. 623 (1994) at 3 (citing Open Records Decision No. 525 (1989) at 3). Thus, the other exception you have raised does not apply to this information.[9]

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Kymberly K. Oltrogge
Assistant Attorney General
Open Records Division

KKO/ch

Ref.: ID# 22684

cc: Mr. Robert H. Meyer

Ms. Patty Elias
National Computer Systems
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[9]In connection with your argument that section 552.110 of the Government Code protects the requested information, and pursuant to section 552.305(b), we notified NCS, the company whose interests may be affected by the release of the requested information, that a request had been made for its release. NCS has not replied, indicating that the requested test results are, indeed, not trade secret information. *See generally* Open Records Decision No. 552 (1990) (discussing analysis this office uses to determine whether particular information is trade secret for purposes of statutory predecessor to Gov't Code § 552.110).